RECENT DECISIONS.

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ADMINISTRATIVE LAW—MANDAMUS—TITLE TO OFFICE.—The plaintiff, who was appointed secretary by one of two claimants to an office, brought mandamus for his salary. *Held,* mandamus would lie even though the title to the office was involved in the issue. *McKannay* v. *Horton* (Cal. 1907) 91 Pac. 598.

Mandamus is the proper remedy for one holding clear title to office to enforce purely ministerial acts, *Lawrence* v. *Hanley* (1891) 84 Mich. 399; *State ex rel. Leeds* v. *Atlantic City* (1889) 52 N. J. L. 332, but it is well settled that a disputed title to office may not be directly determined by mandamus since the proper procedure is by quo warranto, *King* v. *Mayor* (1788) 2 T. R. 259; *People ex rel. Cuthbert* v. *Detroit* (1869) 18 Mich. 338; *Anderson* v. *Colson* (1871) 1 Neb. 172; *People ex rel. Smith* v. *Olds* (1853) 3 Cal. 167, nor will title to office be determined collaterally by mandamus proceedings. *State ex rel. Vail* v. *Draper* (1871) 48 Mo. 213; *State ex rel. Jackson* v. *Thompson* (1865) 36 Mo. 70; *State ex rel. Dolan* v. *Lane* (1873) 55 N. Y. 217. In the principal case, the court admits that it had no power to decide the title as between the two contestants for the office of mayor, but says that it may inquire into it for the determination of the mandamus proceedings. But since the relator's right to any salary can be established only by determining the title of his appointor, it would not seem proper to grant the writ when the court's decision as to it has no legal effect. Cf. *Smith* v. *Hodgson* (Ga. 1907) 59 S. E. 272.

AGENCY—TENDER BY STRANGER—RATIFICATION.—The plaintiff and the defendant were cotenants of a mining claim. The plaintiff, who was absent, failed to pay the defendant a sum due for assessment work. Hearing of this, J., a stranger, sent an agent to tender the money to the defendant, who refused to accept it. The plaintiff later ratified J.'s act. *Held,* a good tender. *Forderer* v. *Schmidt* (1907) 154 Fed. 475.

The right of tender has always been held legitimately exercised by an agent, *Cropp* v. *Hambleton* (1586) Cro. Eliz. 48; *Bennett* v. *Hunter* (1863) 9 *Wall.* 326; 5 Dane, Abridg. 493, though not by a mere stranger. *Harris* v. *Gex* (1873) 66 Barb. 232. The authority to act as agent may be simply an implication of law, *Gentry* v. *Gentry* (Tenn. 1853) 1 Sneed 87, or inferred from a liberal construction of the circumstances. *Harding* v. *Davies* (1825) 2 C. & P. 77; *Brown* v. *Dysinger* (Pa. 1829) 1 Rawle 408. And, in the absence of previous authority, a ratification by the debtor is easily made out, *Tacey* v. *Irvin* (1873) 18 Wall. 549, even by setting up the tender as a defense. *Kincaid* v. *Brunswick* (1834) 11 Me. 188. But it is essential to a valid ratification that the act should have been done in behalf of a principal, and not as an independent principal, *Keightly* v. *Durant* [1901] A. C. 240; Huffcut, Agency, 32, and the creditors should have a right to be informed of the status of the person making the tender. *Mahler* v. *Newbaur* (1867) 32 Cal. 168. In the principal case J.'s intention to act as the agent of the plaintiff was by no means clear. The decision is, therefore, difficult to reconcile with the principles of agency, although supported by some authority. *Read* v. *Goldring* (1813) 2 M. & S. 86, semble.

ATTORNEYS—DISBARMENT—PERJURY.—A lawyer as a witness in a judicial proceeding made a false affidavit. *Held,* that since a witness was privileged from any prosecution except for perjury, he could not be suspended from practice. *Beckner* v. *Commonwealth* (Ky. 1907) 103 S. W. 378.

As it is better that an individual wrong should be without a remedy than that a witness should be restricted in the freedom of his testimony by the fear of consequences, immunity from actions of slander is universally ex-

tended. 1 Starkie, Slander, 1st Am. Ed., 185; *Hunckel* v. *Voneiff* (1888) 69 Md. 179. But when the witness swears falsely he commits an offense against the public and is punishable for perjury. As an action of disbarment involves the protection of the public, it seems that the principal case extends the doctrine of immunity too far. For instances where perjury has been considered a cause for disbarment, see *Matter of Ryan* (1894) 143 N. Y. 528; *Perry* v. *State* (Ia. 1852) 3 G. Greene 550; *In re Kerrigan* (1887) 31 Fed. 129.

CONFLICT OF LAWS—LAWS FOR DISTRICT OF COLUMBIA ENFORCIBLE IN STATES.—Under an act of Congress a receiver was appointed by the Comptroller of the Currency for an insolvent foreign corporation doing a banking business in the District of Columbia. *Held,* the receiver could collect assets by federal process in any part of the United States. *Lyons* v. *Bank of Discount* (1907) 154 Fed. 391.

Laws made for the District of Columbia are laws of the United States, *Cohens* v. *Virginia* (1821) 6 Wheat. 264, 424, and the general laws of the United States are laws of the District of Columbia. *Ex parte Norvell* (1892) 20 D. C. 348. As an adjunct of its general legislative power, and to render it effectual, Congress can enforce its laws throughout the United States, *Cohens* v. *Virginia, supra; Ex parte Siebold* (1879) 100 U. S. 371; *U. S.* v. *Knight Co.* (1894) 156 U. S. 1, 21, when necessary for the furtherance of the proper purpose of the law. *Cohens* v. *Virginia, supra,* 429. In case of conflict with state law the federal law governs. *Tennessee* v. *Davis* (1879) 100 U. S. 257.

CONFLICT OF LAWS—PRESUMPTION AS TO FOREIGN LAW—WHAT LAW GOVERNS.—A servant of an Alabama corporation sued in Alabama for a tort committed in Florida. *Held,* there being no presumption as to foreign law, and the parties having submitted themselves to the Alabama jurisdiction, the case must be decided by Alabama law. *Watford* v. *Lumber Co.* (Ala. 1907) 44 So. 567.

The common law is presumed to exist in states of English origin, *Flagg* v. *Baldwin* (1884) 38 N. J. Eq. 219; *Stokes* v. *Macken* (N. Y. 1861) 62 Barb. 145, and states populated by emigrants from such states, thus including all the United States but Texas, Louisiana and Florida. *Peet & Co.* v. *Hatcher* (1895) 112 Ala. 514. Contra, Missouri, which extends the presumption only to states of the first class. *Barhydt* v. *Alexander* (1894) 59 Mo. App. 188; *Clark* v. *Barnes* (1894) 58 Mo. App. 667. This is true even where a statute has altered the *lex fori. Whitford* v. *Panama Ry Co.* (1861) 23 N. Y. 465; contra, *Mutual Home, etc., Assn.* v. *Worz* (1903) 67 Kan. 506; cf. 1 COLUMBIA LAW REVIEW 489. But where the law applicable to the case is a foreign law, not the common law, it must be pleaded and proved as a fact. *Kelley* v. *Kelley* (1894) 161 Mass. 111. When this is not done the *lex fori* is applied. *The Scotland* (1881) 105 U. S. 24. The usual ground given is that the foreign law, in the absence of proof, is presumed to be identical with the *lex fori; Sandmeyer* v. *Ins. Co.* (1891) 2 S. D. 346; *James* v. *James* (1891) 81 Tex. 373; but where the *lex fori* is the common law, the reasoning is manifestly grotesque; and where it rests upon statute it is equally unsound. 6 COLUMBIA LAW REVIEW 469. It has been suggested that the failure to plead the foreign law operates as an admission that it is no more favorable to either party than the *lex fori.* Minor, Confl. of L. § 214. This leads to the conclusion of the principal case that the parties voluntarily adopt the *lex fori;* and would seem to provide a logical basis for a position which the courts have been bound to take. Cf. *Brown* v. *Wright* (1892) 58 Ark. 20; *Savage* v. *O'Neill* (1871) 44 N. Y. 298.

CONSTITUTIONAL LAW—JURISDICTION OF THE FEDERAL GOVERNMENT UNDER THE COMMERCE AND ADMIRALTY CLAUSES.—The Attorney-General brought an action for the removal of an obstruction to the entrance to Far Rock-

away Bay, under a Federal statute which requires the approval of the Secretary of War for the construction of any obstruction to navigable waters of the United States, and authorizing the Attorney-General to institute proceedings to enjoin its construction, or to compel its removal. *Held,* that the statute was constitutional under both the commerce and admiralty clauses. *United States* v. *Banister Realty Co.* (1907) 155 Fed. 583. See NOTES, p. 44.

CONSTITUTIONAL LAW—POLICE POWER.—A city had power to provide for a municipal water supply, and to fix and regulate water rates. *Held,* that an accepted ordinance fixing rates for thirty years constituted a contract within the impairment clause of the federal Constitution. *City of Bessemer* v. *Bessemer Waterworks Co.* (Ala. 1907) 44 So. 663.

A similar ordinance fixed telephone rates for fifty years. *Held,* it did not constitute a contract. *Home etc. Co.* v. *Los Angeles* (1907) 155 Fed. 554. See NOTES, p. 39.

CONSTITUTIONAL LAW—STATUTES — CONCLUSIVENESS OF APPROVAL OF GOVERNOR.—An acting Governor signed a bill intending to approve it, and directed his secretary to deliver it to the Secretary of State. The next day a successor in office found the bill on his desk, erased the signature, and vetoed it. *Held,* the bill became a law when signed with intention to approve. *Powell* v. *Hayes* (Ark. 1907) 104 S. W. 177.

In Illinois, as long as the bill remains before the Governor, he may reconsider his approval, *People* v. *Hatch* (1857) 19 Ill. 282, but once it passes beyond his control, as by filing in the office of the Secretary of State, the bill becomes law, although signed by mistake. *People* v. *McCullough* (1904) 210 Ill. 488. The rule enunciated in the principal case precludes any reconsideration even while the bill is yet in hand; and it seems that evidence of a final consideration, such as did appear in the principal case, and see *Marbury* v. *Madison* (1803) 1 Cranch 137, should be held essential to a conclusive approval and be embodied in the rule. The test of physical control, *supra,* calls for particular evidence of final consideration and while this may lead to certainty it ignores the importance of the intention to approve.

CONTRACTS—STATUTES OF LIMITATIONS—APPLICATION OF PAYMENTS.—A creditor, holding two notes of his debtor, applied an undirected general payment to that one of the two, which was barred by the Statute of Limitations. *Held,* the creditor could make such application, but did not take the note out of the Statute. *McBride* v. *Noble* (Colo. 1907) 90 Pac. 1037.

If a debtor fails to direct the application of a part payment, the creditor may appropriate it to any debt, Banning, Limitation of Actions, 2nd Ed. 73; *Ayer* v. *Hawkins* (1846) 19 Vt. 26, even if barred by the Statute of Limitations; *Mills* v. *Fowkes* (1839) 5 Bing. N. C. 455; *Ramsay* v. *Warner* (1867) 97 Mass. 8, 13; but the latter proposition has been criticized. 2 Dan., Neg. Inst., 5th Ed., § 1252; *Nash* v. *Hodgson* (1855) 6 DeG., M. & G. 474. A part payment ordinarily lifts the bar of the Statute because it is a deliberate act, which, while not a promise, constitutes, in the absence of contrary circumstances, *Roscoe* v. *Hale* (Mass. 1856) 7 Gray 274; *Lowery* v. *Gear* (1863) 32 Ill. 383, a clear recognition of a subsisting debt, from which a promise to pay it may be implied. *Corliss* v. *Grow* (1886) 58 Vt. 702. The weight of authority is in accord with the principal case in refusing to a creditor the power thus to take a debt out of the Statute. *Mills* v. *Fowkes, supra; Pond* v. *Williams* (Mass. 1854) 1 Gray 630; *Blake* v. *Sawyer* (1891) 83 Me. 129; *Armistead* v. *Brooke* (1857) 18 Ark. 521, 524. Contra. *Ayer* v. *Hawkins, supra; Sanborn* v. *Cole* (1891) 63 Vt. 590; *Beck* v. *Haas* (1888) 31 Mo. App. 180, on the ground that the debtor must have intended the particular application made and the consequences of an express appropriation must follow: but Missouri has since joined the weight of authority. *Wilder* v. *McAllister* (1901) 91 Mo. App. 446.

The distinction between the right of a creditor to apply a general payment to any valid debt, and the existence of the unequivocal acknowledgment releasing the debt from the operation of the Statute, is recognized and correctly applied in the principal case.

CORPORATIONS—CONSOLIDATION—STOCKHOLDER'S RIGHT TO OBJECT.—The plaintiff purchased stock in the defendant company, whose amended certificate of incorporation permitted it to consolidate with another corporation. *Held*, that as the amendment had been made previous to the plaintiff's purchase, he had no right to object to the proposed consolidation. *Colgate* v. *U. S. Leather Co.* (N. J. 1907) 67 Atl. 657.

The principal case rests upon the theory that governing statutes enter into and form part of every contract of stock subscription, 1 Thompson, Corps. § 346; Noyes, Intercorporate Relations § 41, and is supported by a consensus of authority. *Sparrow* v. *Evansville etc. R. Co.* (1856) 7 Ind. 369; *Jones* v. *Missouri-Edison Co.* (1905) 135 Fed. 153; *Mayfield* v. *Alton etc. R. Co.* (1902) 198 Ill. 528. It is of especial interest, however, as it indicates a preliminary question always to be determined in the numerous cases involving the right of a dissenting stockholder to object to alterations in the corporate enterprise. 7 COLUMBIA LAW REVIEW 598.

CORPORATIONS—SUBSCRIPTIONS TO STOCK PRIOR TO INCORPORATION.—The defendant subscribed to stock of a corporation to be thereafter formed. *Held*, the corporation has a right of action on the subscription; *semble*, that the subscriber was bound from the date of the subscription. *Nebraska Chicory Co. etc.* v. *Lednicky* (Neb. 1907) 113 N. W. 245. See NOTES, p. 47.

CRIMINAL LAW—ARMY—MUNICIPAL ORDINANCE.—A United States soldier was arrested and sentenced to imprisonment for sixty days for violating a municipal ordinance directed against unsanitary offenses. His commanding officer petitioned for a writ of habeas corpus in a federal court. *Held*, the writ would issue. *Ex parte Schlaffer* (1907) 154 Fed. 921.

This decision is sound in refusing to adopt the doctrine of *Ex parte Bright* (1874) 1 Utah 145, which exempts a soldier from liability for violating a municipal ordinance. The general principle is settled that in time of peace the civil law is supreme, and that a soldier, unless acting under lawful authority, is amenable to the ordinary civil courts as any other citizen, Tytler, Military Law 153; *Steiner's Case* (1854) 6 Op. Attys. Gen. 413; *U. S.* v. *Clark* (1887) 31 Fed. 710, in the absence of clear and direct language of Congress. *Coleman* v. *Tennessee* (1878) 97 U. S. 509, 514. It is no defense that imprisonment will interfere with his military duties. *Ex parte McRoberts* (1879) 16 Ia. 600. The statute requiring commanding officers to deliver up soldiers guilty of crimes against person or property, Rev. Stat. U. S. § 1342, was intended solely as an aid to the civil authorities, *Coleman* v. *Tennessee, supra*, and contrary to the opinion in *Ex parte Bright, supra*, obviously implies no exemption from liability for other offenses. The decision implies that the minimum sentence must be imposed on soldiers, else it is wholly void, which is unsupportable on principle or authority; or that the sentence was unusually severe: and for this cause a sentence cannot be reviewed. *Cummins* v. *People* (1879) 42 Mich. 142.

CRIMINAL LAW—STATUTE OF LIMITATIONS—NEW YORK CODE OF CRIMINAL PROCEDURE.—The indictment and proof both showed that more than the period of limitation had run before the finding of the indictment. The defendant did not refer to the Statute of Limitations on the trial, but moved to dismiss at the close of the People's case, and for a new trial, after verdict, on the ground that the evidence did not prove a crime, and also in arrest of judgment; all of these motions were denied. *Held*, the defendant could not suggest the defense of the Statute of Limitations for the first time on appeal. *People* v. *Blake* (N. Y. 1907) 38 N. Y. Law Jour., No. 30.

In New York an indictment need only allege any time prior to the date of its finding; Code Cr. Pro. § 284, subd. 5; and since the criminal Statute of Limitations, C. Cr. P. §142, contains certain exceptions, C. Cr. P. § 143, the objection cannot be taken by demurrer, C. Cr. P. § 323; *People* v. *Durrin* (1884) 2 N. Y. Cr. 328, nor by motion in arrest of judgment, C. Cr. P. §§ 331, 467; *People v. Van Santvoord* (N. Y. 1821) 9 Cow. 655, but is raised under the plea of not guilty. C. Cr. P. § 332; *U. S.* v. *Cook* (1872) 17 Wall. 168. Notwithstanding the statements of text-writers that a barred offense is no crime, Whart., Cr. Pl. & Pr. § 316, the Statute of Limitations in New York, at least, is an affirmative defense, which should be specifically brought to the court's attention by an appropriate motion or request to charge. *People* v. *Austin* (N. Y. 1901) 63 App. Div. 382. This gives the prosecution an opportunity to prove matters to take the offense out of the Statute. Cf. *Osgood* v. *Toole* (1875) 60 N. Y. 475. Although in a criminal action certain fundamental defects may be availed of at any time, *People* v. *Bradner* (1887) 107 N. Y. 1, yet ordinarily some appropriate step must be taken in the trial court, *People* v. *Huson* (1907) 187 N. Y. 97, and an appellate court cannot be asked to piece out a defense from separated facts in the record. *McDonald* v. *Mining Co.* (1859) 13 Cal. 220, 239. The tendency of the New York courts is to require timely, specific and proper objections, and to prevent the raising of new issues on appeal. *People* v. *Wiechers* (1904) 179 N. Y. 459; cf. *Boughn* v. *State* (1895) 44 Neb. 889.

EQUITY—CONSULS—PROTECTION OF ALIENS.—The defendant corporation was carrying on a life insurance business not authorized by its charter, using the name of the Emperor of Austria as part of its corporate name, thereby inducing ignorant Austrian immigrants to deal with it under the belief that in this country as in Austria the use of the Emperor's name showed that the business was under his special patronage. *Held,* that at the suit of the consul, under the treaty between the United States and the Emperor of Austria ratified June 27th, 1871, an injunction would issue against the use of the Emperor's name. *Von Theodorovich* v. *Franz Josef Beneficial Ass'n* (1907) 154 Fed. 911.

The treaty provides that consuls "may in the exercise of their duties apply" to the courts "for the purpose of protecting the rights of their countrymen." These rights, undoubtedly, must be rights recognized by the laws which the court applied to may enforce. No one of these immigrants individually, nor a number of them collectively could have obtained this injunction, although they might seek a rescission of their contract on the ground of fraud, *Higgins* v. *Crouse* (1892) 63 Hun 134, or certainly damages at law. *Henry* v. *Dennis* (1901) 95 Me. 24; *Comm.* v. *Call* (1839) 21 Pick. 515, 523. The action most nearly analogous is that in which the Attorney-General is allowed to protect the people from conditions injurious to health or safety and the property of the people generally. *People* v. *Oakland Water Front Co.* (1897) 118 Cal. 234; *People* v. *Tweed* (N. Y. 1872) 13 Abb. Pr. N. S., 25, 73; *Att'y-Gen'l* v. *Steward and Taylor* (1869) 20 N. J. Eq. 415; and see *Att'y-Gen'l* v. *City of Salem* (1869) 103 Mass. 138, 140. Here, however, the gravamen is deception. Cases of injunction against unfair competition are not analogous, for although the public are deceived, the action is not brought in their behalf. 7 COLUMBIA LAW REVIEW 120; *James* v. *James* (1872) L. R. 13 Eq. 421. The action in the principal case seems anomalous, but inasmuch as it involves the protection of property rights, *The Emperor of Austria* v. *Day* (1860) 3 De Gex, F. & J. 217, it seems a fit case for equitable intervention, especially in view of the evident scope and purpose of the treaty. The court cites no authority in support of its position, although it refers without citing to "a similar bill entertained some two years ago."

EQUITY—INJUNCTION—PROPRIETARY RIGHT IN LETTERS.—The defendants, possessing letters written by a well-known painter, proposed to use, in the

publication of a biography, information derived from them concerning his habits, character, opinions, and doings. *Held*, the plaintiff, his executrix, was not entitled to an injunction. *Philip* v. *Pennell* (1907) 76 L. J. Ch. 663.

The common law gave to an author a proprietary right in his production, originally perpetual, but superseded by statutory copyright after publication, *Donaldson* v. *Beckett* (1774) 4 Burr. 2408, enforceable in equity by injunction, *Webb* v. *Rose* (1732) cited 4 Burr. 2330; *Forrester* v. *Waller* (1741) cited 4 Burr. 2331, defined by Lord Mansfield as an incorporeal right to the sole printing of a set of intellectual ideas communicated by a set of words. *Millar* v. *Taylor* (1769) 4 Burr. 2303. Another in rightful possession of the manuscript might make any use of it but multiplying it in print. *Millar* v. *Taylor, supra; Duke of Queensbury* v. *Shebbeare* (1758) 2 Eden 329. Following out the spirit of this common law copyright, it is held to be infringed also by substantial reproduction or colorable imitation. *Caird* v. *Simes* (1887) 12 App. Cases 326; *Aronson* v. *Baker* (N. J. 1887) 16 Stew. Eq. 365. But a fair use not amounting to substantial reproduction is not an infringement. *Abernethy* v. *Hutchinson* (1824) 3 L. J. Ch. 209; *Burnell* v. *Chown* (1895) 69 Fed. 993. The proprietary right of a writer in letters is an extension of the common law copyright, first applied to letters of literary merit, *Pope* v. *Curl* (1741) 2 Atk. 342, later to letters of any description. *Gee* v. *Pritchard* (1818) 2 Swanst. 402; *Woolsey* v. *Judd* (N. Y. 1855) 4 Duer 379. It is identical with the right of an author in unpublished manuscript. *Grigsby* v. *Breckenridge* (Ky. 1867) 2 Bush 480. The principal case seems sound in refusing to enlarge the right beyond the suppression of publication, literal or in paraphrase.

EQUITY—INJUNCTION—UNCLEAN HANDS.—The plaintiff seeks an injunction to compel the defendant to keep secret a process for detinning which had been placed in trust with him. Unknown to the plaintiff, his agent had pirated the process and the user of it constituted a fraud. *Held*, an injunction would issue. *Vulcan Detinning Co.* v. *American Can Co.* (N. J. 1907) 67 Atl. 339. See NOTES, p. 40.

EQUITY—TRUSTS—DUTY OF BANK.—A bank paid out trust funds to the trustee knowing that the trustee was committing a breach of trust by improper withdrawal of the funds. *Held*, the bank was liable to the cestui. *American Nat. Bank* v. *Fidelity etc. Co.* (Ga. 1907) 58 S. E. 867.

A bank cannot pay to the trustee knowing that he is withdrawing the funds in breach of his trust and thus facilitate such breach, *Duckett* v. *Mechanics Bank* (1898) 86 Md. 400; *Bundy* v. *Monticello* (1882) 84 Ind. 119; *Manhattan Bank* v. *Walker* (1880) 130 U. S. 267; *Commercial Bank* v. *Jones* (1857) 18 Tex. 811, but if the bank has no knowledge of the breach of trust it cannot supervise the action of a trustee and must presume that the funds are being properly withdrawn, *Randolph* v. *Allen* (1896) 73 Fed. 23; *Goodwin* v. *American etc. Bank* (1881) 48 Conn. 550; *Munnerlyn* v. *Bank* (1891) 88 Ga. 333; *State Bank* v. *Reilly* (1889) 124 Ill. 464, 470, except where the circumstances are such that the bank should have been put upon its guard. *Shaw* v. *Spencer* (1868) 100 Miss. 382; *Duncan* v. *Jaudon* (1872) 15 Wall. 165; see, *Field* v. *Schieffelin* (N. Y. 1823) 7 Johns. Ch. 150. It would seem that the bank should be a party to the breach of trust in order that liability should accrue, see. *Gray* v. *Johnston* (1868) L. R. 3 H. L. 1; *Keane* v. *Roberts* (1819) 4 Madd. 332, 356, and therefore that the bank should pay to the trustee providing that at the time of the withdrawal of the funds the trustee is acting within the legitimate course of his duties, even though the bank had reasonable grounds to believe that the trustee would subsequently commit a breach of his trust, since at the time of payment the bank was but properly exercising its duties and was not a party to an illegal transaction.

EVIDENCE—VERBAL ACTS—DECLARATIONS BY ONE IN POSSESSION OF PROPERTY —CLAIM OF TITLE.—In a controversy between the heirs of a husband and

wife as to whether a deed purporting to convey land to said husband and wife jointly was in fact a mortgage as to the wife, evidence was offered of self-serving declarations of the husband, made while in possession of the land. *Held,* the evidence was admissible "to illustrate and qualify the possession." *Hubbard* v. *Cheney* (Kan. 1907) 91 Pac. 793. See NOTES, p. 43.

GARNISHMENT—PROPERTY SUBJECT—TORT LIABILITY.—At the time of service of a garnishment summons, a suit for personal injury was pending between the plaintiff's debtor, W., and the garnishee as defendant. Subsequently, the defendant gave W. a sight draft for $1,750 to purchase a release from the claim, although denying its liability. The defendant answered the garnishment summons and denied being indebted to W. at any time since the service. *Held,* the defendant was liable for the amount of the plaintiff's debt against W. *Lee and Anderson* v. *L. & N. Ry. Co.* (Ga. 1907) 58 S. E. 520.

The Court based its judgment upon the fact of a debt due to the plaintiff's debtor, and also upon the theory of property. The Georgia Code (1895) § 4712, provides that "all debts owing to the defendant or any property in the hands" of a third party at the time of process or before answer, are subject to garnishment. Although a claim arising from tort may be considered as property of the injured party, *Banks* v. *McCandless* 119 Ga. 793, 798, the garnishment of the tort-feasor cannot hold it, since the property is not in his hands. Code § 4712, *supra.* But the code provision is broad enough to include under debts, "everything becoming due" by the garnishee to the debtor; such garnishment statutes shall be liberally construed, *Dunning* v. *Owen* (1817) 14 Mass. 157, and those of some States expressly provide thus. Code Iowa (1897) § 3446; *Davis* v. *Mahany* (1875) 38 N. J. L. 104. And so, upon a sale for cash, where payment is a condition to title passing, *Bergan* v. *Magnus & Co.* (1896) 98 Ga. 514, strictly speaking no debt arises, yet if the purchaser's non-payment was due to service of garnishment upon him, this would probably shield him in an action for the non-payment. See *Paul* v. *Reed* (1872) 52 N. H. 136, 139.

LANDLORD AND TENANT—CONSTRUCTIVE EVICTION—ACT OF SERVANT.—The superintendent of an apartment house habitually listened to the telephone conversations of the defendant's wife, and made use of the information thus acquired frequently to insult her. Despite complaint, the landlord neglected to dismiss the superintendent, whereupon the defendant abandoned the premises. *Held,* the rent could not be recovered. *Fox* v. *Murdock* (1907) 38 N. Y. Law Jour., No. 55.

The doctrine of constructive eviction was established in an early case where the landlord harbored immoral persons near the demised premises. *Pendleton* v. *Dyett* (N. Y. 1826) 8 Cowen 727. Though criticized for a time, *Ogilvie* v. *Hull* (N. Y. 1843) 5 Hill 52, 54; *Royce* v. *Guggenheim* (1870) 106 Mass. 201, 205, the doctrine has persisted, *Cohen* v. *Dupont* (N. Y. 1848) 1 Sandf. 260; *Sully* v. *Schmitt* (1895) 147 N. Y. 248; 5 COLUMBIA LAW REVIEW 548, and has been applied to the maintenance of a long series of minor nuisances, *Cohen* v. *Dupont, supra,* or of single major nuisances. *Duff* v. *Hunt* (1891) 16 N. Y. Supp. 163; *Tallman* v. *Murphy* (1890) 120 N. Y. 345; *Wade* v. *Herndl* (1906) 127 Wis. 544. That the landlord is under a greater duty with respect to his servants than with respect to his tenants would seem clear. The retention of an improper servant may, therefore, constitute a constructive eviction; that is, when the servant's acts constitute a material impairment of the tenant's beneficial enjoyment of the premises, *Humes* v. *Gardner* (N. Y. 1898) 22 Misc. 333, and from the landlord's knowledge thereof an intention on his part to evict may be implied. *Haas* v. *Ketcham* (1904) 87 N. Y. Supp. 411. The courts have properly refused to extend the doctrine to extreme limits; *Seaboard Realty Co.* v. *Fuller* (N. Y. 1900) 33 Misc. 109; and the proof in the principal case would not seem to justify its application.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—STREET SPRINKLING.—Abutting property owners were assessed by virtue of an ordinance for street sprinkling done by the city. *Held*, the statute authorizing the ordinance was unconstitutional. *Stevens* v. *City of Port Huron* (Mich. 1907) 113 N. W. 291.

Although an improvement to real estate implies durability, *City of Chicago* v. *Blair* (1894) 149 Ill. 310; *Kansas City* v. *O'Connor* (1900) 82 Mo. App. 655; cf. *Sears* v. *Boston* (1899) 173 Mass. 71, yet special benefit to the property holder by whatever means accomplished would seem on equitable grounds to justify a special assessment. *Reinken* v. *Fuering* (1891) 130 Ind. 382; *State* v. *Reis* (1888) 38 Minn. 371; *Pettit* v. *Duke* (1894) 10 Utah 311; cf. *N. Y. Life Ins. Co.* v. *Prest* (1896) 71 Fed. 815. Improvements such as cleaning snow, slush, or mud from the sidewalks may justify special assessment not only as conferring special affirmative benefits, cf. *Carthage* v. *Frederick* (1890) 122 N. Y. 208, but also as relieving the abutter from a duty with which he might otherwise be burdened under a police regulation. Cf. *In re Petition of Goddard* (1835) 16 Pick. 504; *Carthage* v. *Frederick, supra.* But to impose on the abutter the duty of allaying the dust on the street would be pushing the police power to the verge of unconstitutionality; and the affirmative benefit is so slight as to have been questioned. *City of Chicago* v. *Blair, supra.* The combined affirmative and negative benefits, therefore, but barely justify other courts in reaching a result different from the principal case. *State* v. *Reis, supra; Reinkin* v. *Fuering, supra.*

NUISANCE—PERCOLATING WATERS.—The defendant caused the water of a running stream to percolate into the plaintiff's land. *Held*, it was for the jury to determine whether the defendant's use was reasonable, and due care had been exercised. *Moore* v. *Berlin Mills Co.* (N. H. 1907) 67 Atl. 578.

The doctrine that one may cause damage to another because of a reasonable and careful use of one's property, *Booth* v. *Rome R. R.* (1893) 140 N. Y. 267, is of limited application. *Pixley* v. *Clark* (1866) 35 N. Y. 520. Admittedly, it has no reference to trespass; *Hay* v. *Cohoes Co.* (1849) 2 N. Y. 159; and it has, in fact, been extended only to minor harms arising from smoke, dust, or noise, though accompanied by a slight physical invasion with particles of matter; *Rhodes* v. *Dunbar* (1868) 57 Pa. St. 274; cf. *Campbell* v. *Seaman* (1876) 63 N. Y. 568; or to a merely temporary use without physical invasion. *Booth* v. *Rome R. R., supra.* But ordinarily any use of property entailing an infringement of another's possession constitutes a nuisance; *Mairs* v. *Manhattan Real Est. Ass.* (1882) 89 N. Y. 498, 505; and while the line between dust and stones, vapor and water, is merely one of degree, it is this line which must be drawn to preserve the rights of property owners. As the principal case shows a permanent physical invasion, the inquiry into its reasonableness would seem unsound and this has been the conclusion reached in other jurisdictions on similar facts. *Pixley* v. *Clark, supra; Ellington* v. *Bennett* (1877) 59 Ga. 286; *Wilson* v. *Bedford* (1871) 108 Mass. 261; contra, *Quinne* v. *Ry. Co.* (1884) 63 Ia. 570; *Esson* v. *Wattier* (1893) 25 Ore. 7.

PARTNERSHIP—GOOD WILL—VALUE.—A surviving partner, who later qualified as executor, with the tacit assent of his co-executor appropriated the good will of the partnership which was engaged in merchandizing imported plant products. The accounting was contested by the residuary legatee. *Held*, the executors must account for the good will, calculated as two years' average net profits. *In re Silkman* (1907) 105 N. Y. Supp. 872.

The good disposition of customers toward an established business, *Trego* v. *Hunt* (1896) 65 L. J. Ch. 1; *Johnson* v. *Robert* (1899) 159 N. Y. 70, is regarded as a partnership asset. *Slater* v. *Slater* (1903) 175 N. Y. 173;

3 COLUMBIA LAW REVIEW 496. But, in some jurisdictions the good will on the death of a partner is considered merely the probability of old customers resorting to the old place, *Griffith* v. *Kirley* (1905) 189 Mass. 522, 527, and the surviving partner may canvass these. *Hutchinson* v. *Nay* (1905) 187 Mass. 262; contra, *David* v. *Matthews* [1899] 1 Ch. 378. Good will being so easily dissipated, the surviving partner is held strictly accountable; *Rammelsberg* v. *Mitchell* (1875) 29 Oh. St. 22; *Tenant* v. *Dunlop* (1899) 97 Va. 234; cf. *Hutchinson* v. *Nay, supra;* but its value varies necessarily with its transferability and the legal protection afforded it. Commercially it is valuable as swelling the net profits, and proportionately to the length of time it will continue to have that effect. Hence, while no uniform rule for measuring good will can be adopted, *Von Au* v. *Magenheimer* (N. Y. 1906) 115 App. Div. 84, the proof of net profits together with the circumstances of the business furnishes adequate evidence. *Kirkman* v. *Kirkman* (N. Y. 1898) 26 App. Div. 395. While any rough method of attaining the result must be inaccurate, yet the net profits for an appropriate number of years has been selected as the gauge of value; *Mellersh* v. *Keen* (1860) 28 Beav. 45; *Page* v. *Ratcliff* (1896) 75 L. T. N. S. 71; and is, perhaps, the only test a jury can apply.

PLEADING AND PRACTICE—CROSS-BILLS—FEDERAL JURISDICTION.—A bill to foreclose a mortgage on real property was filed by a British subject against citizens of California. The N. C. Investment Trust, Ltd., also a British subject, intervened and filed a cross-bill for the foreclosure of a junior mortgage, against the above defendants and made one Powell, a British subject, also a defendant to the cross-bill. The original defendants demurred to the cross-bill. *Held*, the demurrer would be sustained. *Newton* v. *Gage* (1907) 155 Fed. 598.

Where a cross-bill brings in new parties, who as original parties would have defeated the jurisdiction of the Federal courts on the ground of the non-diversity of citizenship, the jurisdiction is thereby ousted. *Shields* v. *Barrow* (1854) 17 How. U. S. 130, 145. The court in the principal case notes two exceptions; where the new party claims an interest in property or a fund, of which the court holds possession, *Krippendorf* v. *Hyde* (1884) 110 U. S. 276, and where such party represents an interest already before the Court. *Society of Shakers* v. *Watson* (1895) 68 Fed. 730, 736. The meaning of the latter phrase is not clear. It may describe the case of an executor who comes in to represent his testator, who has died pending the suit; or it may refer to an interest of the intervenor which is necessarily involved in the principal litigation, although still separable from that of the original parties, so as to permit a decree; *Society of Shakers* v. *Watson, supra;* or it may mean that the new party possesses an interest which is identical with an interest of one of the principal parties. *Phelps* v. *Oaks* (1886) 117 U. S. 236. The last is the broadest construction and if applied literally, the exception might be used as a device to let in parties barred by the diverse citizenship requirement. A qualification is necessary and may be thus stated: the intervening party must not be one who was an indispensable party to the original bill. Intervention is "a different proceeding from that of making parties to the main controversy." *Gregory* v. *Pike* (1895) 67 Fed. 837, 846.

PLEADING AND PRACTICE—LIMITATIONS—AVAILABILITY OF STATUTE TO ONE CREDITOR AGAINST ANOTHER.—Upon the administration of a decedent's estate, and a reference therein to take proof of the decedent's debts, one P. sought to prove a note barred by limitation. The administrator did not plead the Statute thereto. *Held*, another creditor might raise this objection upon the reference. *Pendley* v. *Powers* (Ga. 1907) 58 S. E. 653.

As a general rule, the Statute of Limitations is a personal defense, which may be pleaded or waived at the debtor's option, *Brigham* v. *Fawcett* (1880) 42 Mich. 542, and even a creditor whose claim is not barred cannot object to a preferential payment of a barred obligation. *Sheppard's*

Estate (1897) 180 Pa. St. 57. But where the estate of a decedent or an insolvent is administered in equity or in bankruptcy, each creditor, having an interest to increase his *pro rata* share in the fund in court, may object to any other's claim, *Shewen* v. *Vanderhorst* (1831) 1 Russ. & Myl. 347; *Woodyard* v. *Polsley* (1878) 14 W. Va. 211, and cannot be affected by the debtor's failure to plead the Statute. *Woods* v. *Woods* (1897) 99 Tenn. 50; *McCartney* v. *Tyrer* (1897) 94 Va. 198. The distinction seems to be, that although the Statute cannot be used collaterally to impeach an obligation, *Miller* v. *R. Co.* (1893) 55 Fed. 366, yet wherever a third party is in a position to plead the debtor's defenses, he, and not the debtor, has the option to plead or waive the Statute. *Walker* v. *Burgess* (1898) 44 W. Va. 399.

PLEADING AND PRACTICE—SUMMONS BY PUBLICATION—SITUS OF DEBT OF FOREIGN CORPORATION DOING BUSINESS IN NEW YORK.—A policy of insurance, issued by a foreign corporation doing business in New York to a resident of New York, was assigned to a resident of that state. In an action by the executor of the assignee against the insurance company and the non-resident beneficiaries under the policy, an order was granted for service by publication upon said beneficiaries on the ground that the action was brought to establish and enforce a lien upon specific personal property within the state. Code, § 438, sub. 5. *Held,* the order was valid. *Morgan* v. *Mutual B. L. Ins. Co.* (N. Y. 1907) 82 N. E. 438.

Assuming that a debt is "specific personal property" within the meaning of the Code, the decision in the principal case involves the remaining point of the situs of the debt. The rule that the state which charters a corporation is its domicil with reference to the situs of its debts was laid down at a time when there only could it be sued or served with process. *N. E. Mut. Life Ins. Co.* v. *Woodworth* (1884) 111 U. S. 138, 146. The Federal courts make the right to a garnishment or attachment depend upon the right of the creditor to enforce his claim in the particular jurisdiction—reasoning that a debt exists by reason of the presence of the debtor coupled with the fact that the law of the place will make him pay. *Chicago etc. R. R.* v. *Sturm* (1899) 174 U. S. 710; *Harris* v. *Balk* (1905) 198 U. S. 215; *L. & N. R. R.* v. *Deer* (1906) 200 U. S. 176; 7 COLUMBIA LAW REVIEW 544. Although this doctrine is discontenanced in the attachment cases in New York, *Plimpton* v. *Bigelow* (1883) 93 N. Y. 592; *Douglas* v. *Phœnix Ins. Co.* (1893) 138 N. Y. 209, the reasoning is adopted in the principal case and the same rule applied as in cases involving the situs of debt-assets for administration, *Sulz* v. *Mut. R. S. L. Ass'n* (1895) 145 N. Y. 563, and of debts subject to transfer tax. *Matter of Gordon* (1906) 186 N. Y. 471.

QUASI-CONTRACTS—SERVICES IN EMERGENCY.—A physician rendered services to the intestate who was injured in an accident and who never recovered consciousness. *Held,* the plaintiff could recover the value of his services from the estate. *Cotnam* v. *Wisdom* (Ark. 1907) 104 S. W. 164.

At common law physicians were presumed to practice for honorarium and not for compensation, *Chorley* v. *Bolcot* (1791) 4 T. R. 317, though the presumption did not apply to surgeons. *Battersby* v. *Lawrence* (1841) 41 E. C. L. 155; *Little* v. *Oldaker* (1842) 41 E. C. L. 205. The rule was abolished by statute, see *Gibbon* v. *Budd* (1863) 2 H. & C. 92, and never obtained in the United States. *Judah* v. *M'Namee* (Ind. 1833) 3 Blackf. 269; *Graham* v. *Gautier* (1858) 21 Tex., 111, 117; *McPherson* v. *Cheadell* (N. Y. 1840) 24 Wend. 15. Ordinarily no recovery may be had for services rendered without request, for such acts are regarded as officious, *Quin* v. *Hill* (N. Y. 1886) 4 Dem. 69; *Boston Ice Co.* v. *Potter* (1877) 123 Mass. 28; *Bartholomew* v. *Jackson* (N. Y. 1822) 20 Johns, 28; *Glenn* v. *Savage* (1887) 14 Ore. 567, but this does not obtain where the act is necessary to avoid consequences in which the public is interested. *Rogers* v. *Price* (1829) 3 Y. & Jer. 27; *Ambrose* v. *Kerrison* (1851) 10 C. B. 776; *Gould* v. *Moula-*

han (1895) 53 N. J. Eq. 341, such as the acts of physicians in emergencies, *Sherman's Estate* (1889) 6 Pa. Co. Ct. 225; see *Meyer* v. *Knights of Pythias* (1904) 178 N. Y. 63, but the services must not have been intended to be gratuitous. *Osborn* v. *Governors of Guy's Hospital* (1726) 2 Str. 728; *Dye* v. *Kerr* (N. Y. 1851) 15 Barb. 444. The fact that the intestate had lost capacity to contract because of the accident, and therefore could not have made a binding contract for the plaintiff's services, does not affect the right to recover, since the obligations enforced under the doctrine of quasi-contract are those imposed by law irrespective of intention or power to enter into contract. *Sceva* v. *True* (1873) 53 N. H. 627; *Sawyer* v. *Lufkin* (1868) 58 Me. 308; *Trainer* v. *Turnbull* (1886) 141 Mass. 527; *Earle* v. *Reed* (Mass. 1845) 10 Met. 387.

REAL PROPERTY—DEEDS—OMISSION OF GRANTOR'S NAME.—A life tenant and two remaindermen of a parcel of land signed and sealed a deed purporting to convey an estate in fee, but in which only the life tenant was mentioned as grantor. *Held,* the deed conveyed the interests of the remaindermen. *Sterling* v. *Park* (Ga. 1907) 58 S. E. 828.

A deed must contain words sufficient to set forth the agreement of the parties. Shep. T. 55. Accordingly, the grantor must be described by name as a party to the deed. Co. Litt. 35 b. Sealing and delivering is not sufficient to make one a party. *East Skidmore* v. *Vaudstevan* (1586) Cro. Eliz. 56. It has been held that where a party's name is mentioned in another part of the instrument and his intention to join in the conveyance clearly appears, his interest passes, though his name does not appear in the granting clause. *Tretheway* v. *Ellesdon* (1690) 2 Vent. 141; *Lord Say and Seal's Case* (1711) 10 Mod. 40. But in the principal case there appeared no mention of the remaindermen or of their intention to convey. It is difficult to see, therefore, how their interests could be held to have passed without a disregard for the essentials of a valid deed. This view is supported by the great weight of authority in this country. *Catlin* v. *Ware* (1812) 9 Mass. 209; *Agricultural Bank* v. *Rice* (1846) 4 How. U. S. 225; *Stone* v. *Sledge* (1894) 87 Tex. 49, and cases cited. In accord with the principal case see *Elliott* v. *Sleeper* (1823) 2 N. H. 525.

RECEIVERS—CONTRACT—NATURE.—The receiver of an insolvent corporation sold property under the order of the court. The purchaser asked to be relieved from his purchase because of failure of title, and for a return of deposit, with interest, and costs of examination of title and of the proceedings. *Held,* that he would be relieved from his purchase and the deposit would be repaid, but that the other items claimed would not be allowed, as he could not claim damages for breach of contract. *People* v. *New York Building-Loan Banking Co.* (N. Y. 1907) 82 N. E. 184. See NOTES, p. 46.

SALES—STATUTE OF FRAUDS—ACCEPTANCE AND RECEIPT BY VENDEE IN POSSESSION.—The defendant orally agreed with the plaintiff to purchase lumber belonging to the plaintiff already piled on the former's land. *Held,* assuming the defendant to have been in possession of the lumber, there was no acceptance and receipt to satisfy the Statute of Frauds. *Silkman Lumber Co.* v. *Hunholz* (Wis. 1907) 112 N. W. 1081.

The Statute of Frauds requires acceptance and receipt as evidence of the existence of the oral contract. *Shindler* v. *Houston* (1848) 1 N. Y. 261. To constitute a sufficient acceptance there must be at least some dealing with the goods amounting to a recognition of the contract. *Page* v. *Morgan* (1885) 15 Q. B. D. 228. For receipt there need not be a physical transfer of possession, provided there is evidence showing a change in the character of the possession, as where the vendee constitutes the vendor a bailee of the property. *Marvin* v. *Wallis* (1856) 6 E. & B. 726. It is clear that the vendee's bare continuance in possession is neither evidence of acceptance nor of a change in the nature of the possession amounting

to a receipt. Some dealing with the goods must appear inconsistent with the continuance of the former possession, *Lillywhite* v. *Devereux* (1846) 15 M. & W. 285, and evidencing an intention to accept pursuant to the contract. *Dorsey* v. *Pike* (1889) 50 Hun. 534.

TORTS—DECEIT—SELLING PRICE.—The defendant, acting in conjunction with a real estate agent, misrepresented the price for the land fixed by the owner, and induced the plaintiff to purchase. *Held,* such statements were not material allegations of fact on which the purchaser had a right to rely. *Bosley* v. *Monahan* (Ia. 1907) 112 N. W. 1102.

Statements of value by a vendor are generally expressions of opinion; *Parker* v. *Moulton* (1873) 114 Mass. 99; *Noetling* v. *Wright* (1874) 72 Ill. 390; *Ellis* v. *Andrews* (1874) 56 N. Y. 83; as are statements as to the price paid by or offered to the vendor. *Cole* v. *Smith* (1889) 26 Colo. 506; *Hemmer* v. *Cooper* (Mass. 1864) 8 Allen 334; *Bishop* v. *Small* (1874) 63 Me. 12. Other courts on the contrary hold that such statements are material representations of fact, for the falsity of which the vendee may have his action. *Dorr* v. *Cory* (1899) 108 Ia. 725; *Stoney Creek Woolen Co.* v. *Smalley* (1896) 111 Mich. 321; *Fairchild* v. *McMahon* (1893) 139 N. Y. 290, distg. *Ellis* v. *Andrews, supra.* When the parties sustain fiduciary relations so that the party has a right to rely on the statements; *Smith* v. *Patterson* (1873) 33 Oh. St. 70; or the parties have not equal means of knowledge or are on unequal terms; *Cox* v. *Gerkin* (1890) 38 Ill. App. 340; *Rober Iron Co.* v. *Trout* (1887) 83 Va. 397; statements innocent under other circumstances are held fraudulent. *Cole* v. *Smith, supra.* Under either rule the principal case was correctly decided, for it is of common knowledge that prices given to real estate agents are not meant as accurate statements of value to be relied upon, and to extend recovery for misrepresentation to such cases would violate the principles of reasonableness.

WILLS—"DYING WITHOUT ISSUE"—DETERMINABLE FEE.—A testator devised and bequeathed the residue of his real and personal estate as follows: "to my two grand-children, M. and J., share and share alike; and in case both of my grand-children should die without heirs of their bodies living or in being at the time of their death, * * * then it is my will that both shares shall go to my son John Fifer absolutely." *Held,* that the death of the grand-children provided for, was, by the testator's intent, a death either before or after the testator's death. and if they survived him, they took a determinable fee, subject to an executory devise over to John Fifer. *Fifer* v. *Allen* (Ill. 1907) 81 N. E. 1105. See NOTES, p. 37.